



Accident Benefit REPORTER

The Three Faces of The “Any Occ” Test

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At the 104 week anniversary of a motor vehicle accident, the victim will only be entitled to continue to receive income replacement benefits pursuant to the Statutory Accident Benefits Schedule if he or she is “suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience”. Similarly, 104 weeks after the victim first begins to receive long term disability benefits, the test for continued entitlement under most disability policies also changes from an “own occupation” test to an “any occupation” test which is quite similar to the test set out in the Statutory Accident Benefit Schedule. Each policy of disability insurance is different and therefore, the post 104 “any occ” test may be somewhat different to some degree from the post 104 “own occ” test for accident benefits.

As the two year anniversary of a motor vehicle accident nears for these victims, the Accident Benefits and Disability Insurers usually want to determine whether a victim will be able to re-integrate themselves back into the workforce in any capacity and therefore fail to satisfy the “any occ” test. Around this same time, motor vehicle accident victims must begin to put their minds to whether they qualify for a “disability pension” from the Canadian Pension Plan. Once again, a separate but

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TR News

*We are pleased to announce that
Michael L. Bennett
is now a partner at
Thomson, Rogers.*



Michael L. Bennett

similar test is to be applied with respect to eligibility under this federal compensation plan. The test for Canadian Pension Plan Disability Benefits is whether the victim is “incapable regularly of pursuing any substantially gainful employment”.

In order to prepare the victim to receive these three benefits which may be available as the 104 week anniversary approaches, the seriously injured victim must consider attempting some type of vocational retraining or make some attempt to reintegrate themselves into the workforce. The big question facing seriously injured victims at this juncture is whether the victim is obliged to take any job whatever the pay or essential duties, failing which, will the victim risk losing his or her Income Replacement, Long Term Disability and/or CPP disability pension benefits?

ACCIDENT BENEFITS

In the landmark Financial Services Commission of Ontario decision *Terry and Wawanesa Mutual Insurance Company*, Arbitrator Palmer provided the following guidance to automobile insurers in helping them understand the true meaning of the “any occ” test:

“Somehow the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity must be addressed. In my view, Mr. Terry has convincingly demonstrated in his attempt at a work trial that he is completely unable to engage in a sedentary job for which I find he was reasonably suited. He would be unable to consistently attend and sustain a reasonable number of hours of employment as a taxi dispatcher or any similar job.”

What we have learned from the *Terry and Wawanesa F.S.C.O. A00-000017* [2001] decision and other arbitration decisions at the Financial Services Commission of Ontario that have followed, is that the automobile insurer should consider the following factors when it considers whether a person satisfies the “any occ” test:

1. Is the victim substantially unable to perform the essential tasks of a proposed employment?
2. Is the victim capable of performing employment commensurate in nature, status, remuneration and hours with the victim’s pre-accident employment? and
3. Will the victim be able to perform the proposed work at a competitive level with other employees?

LONG TERM DISABILITY

The notion of entitlement to long term disability benefits after 104 weeks has been considered for some time in the jurisprudence. However, one difficulty a victim may encounter when dealing with entitlement to long term disability benefits is the different wording of each policy that to some degree changes the meaning and interpretation a court will give to the “any occupation” test under the specific policy. That said, the courts who have considered these various tests have asked themselves the following fundamental questions regarding the test for Long Term Disability entitlement which may be set out as follows:



1. Does the proposed occupation consider the victim's pre-accident "education, training or experience"?
2. If the victim is required to retrain to engage in a new occupation, is the retraining commensurate with the victim's interests, abilities and aptitudes?
3. Is the proposed occupation right for "this victim" looking at all the victim's life circumstances and experiences including the proposed occupation's salary, status and remuneration?

CANADIAN PENSION PLAN DISABILITY PENSION

The leading case for entitlement to a disability pension under the Canadian Pension Plan is the *Villani v. Canada (Attorney General)* [2001] F.C.J. No. 1217, a decision of the Federal Court of Appeal. The crux of the appeal turned on whether the test for entitlement to a CPP disability pension is an objective one, or whether it was appropriate for an adjudicator to consider a victim's "education, training and experience" and "business reality". The Pension Appeals Board in *Villani* stated that the words "incapable of pursuing any substantially gainful employment" suggested an objective test where the availability and likelihood of obtaining suitable employment should not be considered.

Upon appeal at the Federal Court of Appeal, this court refused to accept that an inquiry into a person's ability to engage in any substantially gainful occupation should remain blind to "real world" considerations. Instead, this Court adopted a "real world" or "business reality" test that requires the consideration of an applicant's background, medical condition and the availability of alternative employment. Hypothetical occupations cannot be divorced from the particular circumstances of the applicant such as age, education level, language proficiency and past work and life experience.

KEY CONSIDERATIONS

Therefore, when considering whether there is a reasonably suitable job for victims who continue to suffer from impairments after 104 weeks, the proposed occupation must be considered as a whole and then held up against the victims' past experiences and existing impairments. The following questions should be considered: does this job have reasonable hours in light of the victim's impairments? Can the victim be productive at this job? Does this occupation take the victim's pre-accident academic and vocational training into account?

Does this occupation take into account the victim's pre accident job status and remuneration received? These questions must all be addressed prior to an Automobile Insurer or Disability Insurer denying income benefits after 104 weeks. And since *Villani*, these same considerations will be relevant when applying for a CPP disability pension.

Michael L. Bennett, Partner

Preparation of Care Cost Evidence for Trial



*L. Craig Brown
Partner*

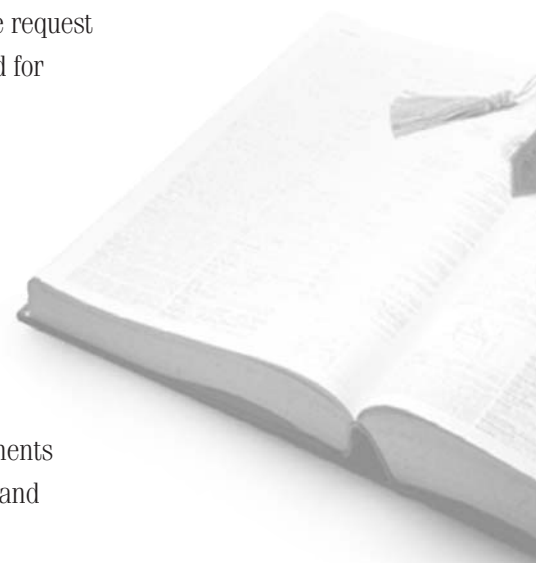
*H*health care professionals and future care planners have become increasingly expert at preparing assessments of future care costs in cases involving brain injury with residual functional impairment. These reports are often used by the victim's lawyer in the prosecution of claims against the accident benefit carrier and against the tort insurer. In a very small number of cases, it will be necessary for those who participated in the creation of the report to give evidence at trial. Proper preparation for that task is essential to the effective presentation of the often complex life care plan that has been developed to respond to the victim's impairment.

In a recent case tried before Madam Justice Spies and jury in Toronto (*Resch v. Canadian Tire*), I had occasion to call evidence from the life care planner and other expert witnesses who were involved in the plaintiff's care. The defendant also called expert evidence on future care costs and the jury had the opportunity to compare the future scenarios presented by each side in the case. A number of steps taken in preparation for trial helped the jury to deliver a verdict that clearly preferred the plaintiff's experts' evidence to that of the defendants.

First in the process is to do a careful review of the case at least 120 days prior to the scheduled start of the trial. This is important because any fresh reports or changes to old reports must be served on the defendant's lawyer at least 90 days prior to the trial. This review should ideally take the form of a case conference involving the victim's lawyer, care cost planner and any health care professionals providing significant treatment. Any reports on care cost issues prepared for the plaintiff should be carefully reviewed. In addition, reports prepared at the request of the defendant should be available and should also be carefully reviewed for comment and response if that is deemed to be appropriate.

One of the purposes of the review is to update the data and assumptions used in preparing the report. In order to effectively do that, it is necessary to carefully interview the victim's family and caregivers as well as the victim him/herself. This should be done by the care cost planner in advance of the review meeting. If a plan of care is in place and operating, then updates on how well it is working and what it is actually costing will prove invaluable as a foundation for projections into the future. Any changes or improvements in the victim's level of functioning can be taken into account at this time and programs and outcomes revised if necessary.

It is not usually possible to have every treating health care professional in attendance at such a meeting, so it may be necessary, as a follow-up measure, to interview physicians and others who may have had a role in caring for the victim.



This should be done as an immediate follow up to the review meeting. Careful notes of any conversations with treating practitioners should be kept since these interviews will form a foundation for the oral evidence that is given at trial.

In the preparation of final reports for delivery prior to trial, careful attention should be given to charts and graphs displaying the quantitative aspects of the future care cost plan. Wherever wage rates or fees for rehabilitation services are set out, they should be updated and verified to make sure that they represent accurate costs. It is very helpful if the charts that present this data are logical, well organized and concise so that they can be used as an outline for the oral evidence that is given at trial.

In my experience, it is very time consuming to organize and distill data into a compact and effective graphical presentation. The advantage of spending the time is that trial counsel will have a much easier time leading the witness' evidence through the life care plan and, at the conclusion of oral evidence, will be able to file the charts and graphs produced by the witness as an exhibit for the assistance of the jury.

The reason for ensuring that the data contained in the charts is accurate and up to date is so that last minute changes in oral evidence do not render obsolete the charts and graphs that you intend to use at trial.

In the Resch case, which I mentioned above, we were able to provide the jury with a two-page summary chart of all the evidence given on behalf of the plaintiff on the issue of future care costs and compare it with the evidence that was given by the defendant's expert on a line-by-line basis. The two-page chart that was created using the experts' evidence was then given to the jury to use in coming to their decision on the appropriate amount to be awarded for care costs. In the Resch case, the jury awarded the plaintiff \$1.5 million under this head of damage. This very significant award emphasizes the importance of taking great care in presenting this evidence at trial.

All of the pre-trial preparation which I have discussed above will culminate in a lengthy briefing of the care costs expert and of any health care professional whose opinion is used as part of a foundation for the health care expert's report. The pre-trial briefing will often require more than one day. Time should be set aside well in advance of the trial for this critical step in preparation for testimony at trial.

Properly assessed, the care costs associated with a brain injury case are often the largest single component of the damages awarded to the plaintiff. The four month trial preparation process that I have described above will assist all trial participants in presenting the most effective and persuasive case for adequate care of the victims of a traumatic brain injury.

L. Craig Brown, Partner



Motions for Interim Benefits – The New DAC?



David F. MacDonald
Partner

Since March 1, 2006, claimants have been unable to access DACS to attempt to resolve denials of accident benefits. In the absence of DACS, claimants face a reduced number of approaches they can use to obtain payment of improperly denied benefits.

As it is critical to arrange timely access to recommended rehabilitation, it is important to use all available dispute resolution mechanisms to that end. After mediating denied benefits it may be appropriate to file for Arbitration and seek an Interim Order for payment of benefits while awaiting an Arbitration date.

ARBITRATION – MOTION FOR INTERIM BENEFITS:

Section 279 (1) (4.1) of the Insurance Act indicates:

“279 (1) (4.1) Interim Orders – The Director and every Arbitrator appointed by the Director may make Interim Orders pending the Final Order in any matter before the Director or Arbitrator.”

CRITERIA:

There is some ambiguity arising from the prevailing arbitral decisions as to the criteria used by Arbitrators for granting or refusing Interim Orders; however, a majority of Arbitrators find that the Applicant must show urgency and must show a *prima facie* entitlement for the benefit in dispute for an Interim Order to be granted.

Prima facie entitlement means that:

“The Applicant must produce evidence, which, if unanswered and believed is sufficient to render a reasonable conclusion in favor of entitlement.”

Normally the evidence that can be used in a motion seeking an Interim Order for benefits should consist of:

1. Affidavits from treating practitioners confirming the comments within the reports which relate to the benefits which are being sought and the effect of the denial of those benefits;
2. An Affidavit from counsel setting out a relevant claims-handling chronology; as well as
3. An Affidavit from the claimant setting out the urgency of the need.

The insurer has the right to cross-examine the deponents on their Affidavits and may compel deponents to attend for cross-examination at the hearing itself.

EFFECT OF INTERIM ORDER:

An Interim Order is not subject to Appeal and is binding upon the parties pending either settlement or the arbitration decision.

RECENT INTERIM ORDER - ATTENDANT CARE ENTITLEMENTS:

On a Motion for Interim Benefits in which the writer was counsel for the Applicant, ***Keyes and the Personal Insurance Company of Canada***, the Applicant Jessica Keyes was successful in obtaining an Interim Order for payment of Attendant Care Benefits. The Applicant suffered catastrophic brain injuries as a result of a 2003 car accident.

As a result of the motion, the Arbitrator granted attendant care benefits based upon a Form 1 that had been prepared by a treating practitioner despite a more recent Attendant Care DAC which reduced attendant care benefits to \$0.

Notwithstanding that an Attendant Care DAC had been completed, the Arbitrator found that the Applicant had met her responsibility to show urgency because of the potential danger to her safety if she did not receive the appropriate attendant care, and had demonstrated a *prima facie* case of entitlement to substantial attendant care benefits because:

1. The DAC report left serious questions as to whether or not the DAC complied with Part IV of the Attendant Care DAC Assessment Guidelines;
2. The DAC contained significant errors or attempts to mislead in consideration of Jessica Keyes' pre-accident health; and
3. The Arbitrator accepted as credible and authoritative the affidavit evidence of the treating occupational therapist concerning the ongoing need for and the amount of attendant care required.

The Arbitrator explored the concerns associated with the fact that the claimant's attendant care needs may fluctuate based upon whether or not she was in school. The Arbitrator accepted the writer's submission that the appropriate approach would be for the Applicant to invoice the insurer for the care provided between the date of the Interim Order and the Arbitration Hearing and that the insurer would pay that, subject to the maximum set out by the Arbitrator.

RECENT INTERIM ORDER – ATTENDANT CARE IN HOSPITAL:

In ***Haimov and ING Insurance Company of Canada***, the writer represented the Applicant, Mr. Haimov. Mr. Haimov suffered a catastrophic brain injury as a result of a 2005 car accident. He was an in-patient at Baycrest Hospital when several Form 1s were completed. The insurer failed to honour its obligation to pay attendant care in accordance with the Form 1s and the Expense Applications submitted. The insurer claimed that the responsibility for attendant care was that of OHIP and claimed secondarily that it met any responsibility it had for attendant care when it paid its co-payment of approximately \$1,500.00 per month under the Long Term Care Act. The Applicant brought a motion seeking an Interim Order for payment of attendant care benefits, based upon the Form 1s submitted.

The Arbitrator granted the Applicant's motion, obliging the insurer to pay in-hospital attendant care in accordance with the Form 1s completed by the treating occupational therapist. He disagreed that the insurer was entitled to a deduction from these attendant care payments for any amount paid as a co-payment under the Long Term Care Act.

Although the Reasons to the decision have not been released, by the fact that the Arbitrator ordered additional payment of \$6,000.00, per month in attendant care, it appears that the Arbitrator accepted the Applicant's submission that the co-payment responsibility of the insurer of \$1,500.00 per month was for payment of accommodation and meals under the Long Term Care Act rather than for attendant care.

The Arbitrator found that the Applicant met his obligation to show urgency in that, without the necessary attendant care, the Applicant was exposed to the possibility of death or serious injury through seizure activity, which could occur and be left untreated in the absence of attendant care.

It is plain from the award that the Arbitrator clearly rejected the Form 1 completed by the Section 42 evaluator who had indicated attendant care payable in Hospital should be paid in the hundreds of dollars per month (as opposed to the \$6,000.00 awarded). The Section 42 evaluator had completed the Form 1 without identifying need, but instead focusing upon who the Section 42 assessor presumed should be meeting the need. The Section 42 evaluator completed the Form 1 indicating in several locations that the Hospital was responsible for providing the services for the attendant care needs in those sections. The Arbitrator plainly found that the hospital was not responsible to provide the attendant care required by Mr. Haimov.

CONCLUSION:

After a denial has been made by an insurer and mediation has been sought and failed, motions for Interim Orders for benefits may be appropriate in certain circumstances. The time frame for completing a motion for an Interim Order for benefits will normally be at least two months following the denial of the benefit.

David F. MacDonald, Partner

New at TR...

Stacey L. Stevens and David N. Germain have recently joined the firm as Associates. Stacey Stevens in the Personal Injury Group and David Germain in the Municipal Group.



Stacey L. Stevens



David N. Germain

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